DEPARTMENT OF STATE REVENUE

04-20170481.LOF

Letter of Findings Number: 04-20170481
Sales Tax
For Tax Years 2014-15

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business sold tangible personal property and provided services for a single price thereby constituting a unitary transaction. Sales tax was due on the total price. The Department's adjustments and assessments were correct. Waiver of penalties was warranted.

ISSUES

I. Sales Tax–Unitary Transactions.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467 (Ind. Tax Ct. 2005).

Taxpayer protests the imposition of sales tax.

II. Tax Administration–Negligence Penalty.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of penalties.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an audit for sales tax in the tax years 2014 and 2015, the Indiana Department of Revenue ("Department") determined that Taxpayer had not been collecting sales tax on the proper amount of sales and so issued proposed assessments for sales tax, penalty, and interest for those years. Taxpayer protested the imposition of sales tax, penalty, and interest. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax–Unitary Transactions.

DISCUSSION

Taxpayer protests the imposition of sales tax for the years 2014 and 2015. The Department determined that Taxpayer had been engaging in unitary transactions with its customers but had been charging sales tax only on the amount charged for the tangible personal property sold. The Department therefore issued proposed assessments on the amount of the transactions reflecting the amount charged for services included in the unitary transactions. Taxpayer protests that it believed that only the tangible personal property was subject to sales tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[w]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.*
> (*Emphasis added*).

Next, IC § 6-2.5-1-1 states:

> (a) *Except as provided in subsection (b), "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated*.
> (b) "Unitary transaction" as it applies to the furnishing of public utility commodities or services means the public utility commodities and services which are invoiced in a single bill or statement for payment by the consumer.
> (*Emphasis added*).

IC § 6-2.5-1-2 provides:

> (a) "Retail transaction" means a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1, that constitutes making a wholesale sale as described in IC 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4.
> (b) "Retail unitary transaction" means a unitary transaction that is also a retail transaction.

The next relevant statute is IC § 6-2.5-4-1, which states in relevant parts:

> (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
> (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
> (1) acquires tangible personal property for the purpose of resale; and
> (2) transfers that property to another person for consideration.
> (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
> (1) the property is transferred in the same form as when it was acquired;
> (2) the property is transferred alone or in conjunction with other property or services; or
> (3) the property is transferred conditionally or otherwise.
> (d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.
> (e) *The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:*
> *(1) the price of the property transferred, without the rendition of any service; and*
> *(2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser*.
> . . ..
> (*Emphasis added*).

In *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467, 480-81 (Ind. Tax Ct. 2005), the Indiana Tax Court wrote:

> As mentioned earlier, the provision of services is, generally, not taxable. As a practical matter, however, "mixed transactions" often occur where tangible personal property is sold in order to complete a service contract, or where services are provided in order to complete the sale of tangible personal property. For these mixed transactions, distinguishing the taxable sale of property from the non-taxable sale of services is

> often difficult. Accordingly, the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Ind.Code Ann. § 6-2.5-4-1(c)(2) (West 1994) (amended 2004). Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents "any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred *before its transfer and which are separately stated on the transferor's records."* A.I.C. § 6-2.5-4-1(e)(2) (emphasis added). **Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, "a unitary transaction that is also a retail transaction."** Ind.Code Ann. § 6-2.5-1-2(b) (West 1994). **A unitary transaction is one which "includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated."** Ind.Code Ann. § 6-2.5-1-1(a) (West 1994).
> (*Emphasis in original*)(**Emphasis added**).

Therefore, as provided by IC § 6-2.5-1-1(a) and as confirmed by the court in *Galligan*, when a retail merchant charges a single price for tangible personal property and services, it is considered a unitary transaction and the entire amount is subject to sales tax.

In the instant case, Taxpayer protests that it had been audited by the Department before and this issue was not raised, therefore it thought that it was following the correct procedure. The Department notes that, for purposes of determining whether or not a retail merchant is required to collect and remit sales tax and (if so) in what amount, IC § 6-2.5-1-1 and IC § 6-2.5-1-2 expressly state that unitary transactions are taxed on the entire amount charged. These statutes establish Indiana law in this matter. Therefore, whether or not a prior audit by the Department addressed how Taxpayer was charging its customers is not relevant. Even if the Department overlooked this matter in a prior audit, such oversight does not constitute approval of Taxpayer's methods. IC § 6-2.5-1-1 and IC § 6-2.5-1-2 make it plain that a retail merchant is required to collect sales tax on the entire amount charged in a unitary transaction.

On a secondary note, during the administrative hearing, Taxpayer expressed its belief that the concept of taxing the entire amount of a unitary transaction is a recent change to Indiana tax law. The Department notes that IC § 6-2.5-1-1 and IC § 6-2.5-1-2 (formerly codified as IC § 6-2-1-38) were enacted by the Indiana Legislature in 1963. Also, the Indiana courts have addressed these issues many times before, as evidenced by the Tax Court's decision in *Galligan*. Therefore, these are not new statutes or new concepts. Rather, they are well-established and, as provided by IC § 6-2.5-2-1(b), mandatory sales tax collection and remittance procedures. In conclusion, Taxpayer has not met the burden under IC § 6-8.1-5-1(c) of proving the proposed assessments wrong.

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of interest. The Department notes that it is not permitted to waive interest, as provided by IC § 6-8.1-10-1(e). Taxpayer also protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively

> establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
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> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's assessment of penalties. Taxpayer states that it at all times exercised the level of reasonable care, caution, and diligence expected of an ordinary taxpayer. After review of the documentation and analysis provided in the protest process, the Department agrees with Taxpayer's position. While Taxpayer was mistaken in its application of the sales tax statutes as discussed in Issue I above, it did attempt to comply with its sales tax collection duties. Therefore, waiver of penalties is warranted under 45 IAC 15-11-2(c). However, the Department takes this opportunity to reiterate to Taxpayer that it is now aware of its tax collection responsibilities and any future failure to comply with Indiana tax procedures will warrant the imposition of negligence penalties under IC § 6-8.1-10-2.1. Waiver of interest is not permitted under IC § 6-8.1-10-1(e).

FINDING

Taxpayer's protest to the imposition of penalties is sustained. Taxpayer's protest to the imposition of interest is denied.

SUMMARY

Taxpayer is denied in Issue I regarding the imposition of sales tax. Taxpayer is denied in Issue II regarding the imposition of interest and sustained regarding the imposition of penalties.

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